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Supreme Court of the United States

No. 21—October Term, 1938

Wm. H. Neblett, Vernon Bettin, William George Dickinson and Alfred F. MacDonald, *Petitioners*,

v.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, et al., *Respondents*.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

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STATEMENT OF POINTS URGED FOR A REHEARING.

We respectfully pray that a rehearing be granted on the decision rendered by this Court on December 5, 1938, affirming a decision of the Supreme Court of California, which approved an order of rehabilitation or reorganization of the Pacific Mutual Life Insurance Company of California, a domestic insurer. We present the following points as reasons for the rehearing:

A great nation-wide public emergency is likely to arise because of the relaxation by the decision of the principles, heretofore rigidly adhered to, of due process under the 14th Amendment and of the impairment of the obligation of contract under Article 1, Section 10, of the Federal Constitu-

tion, as applied in the opinion to insurance insolvency proceedings, by a state through a special act of its legislature, making it possible for all insurance companies to adjust their liabilities to their reserves to the great detriment of the public, 65,000,000 of whom are policyholders in the several life insurance companies doing business in the United States;

The decision permits title to be forfeited to the reserves of an insolvent insurance company, in which the policyholders have a contractual interest, and the contracts of all policyholders to be impaired, in a special proceedings, had under an act of the state legislature, which does not provide for notice or hearing; and the commissioner to rehabilitate or reorganize the company under the statute which does not require notice to be given to any one whose contracts or other property rights are affected by the proceedings;

The decision establishes the principle that those who do not assent to the plan are accorded due process by an alternative remedy, which is postponed to an indefinite date in the future, and is never available to a dissenter from the plan unless granted by the insurance commissioner and the trial court, upon whose discretions, exercised in sequence, the remedy is absolutely dependent. To one group of policyholders the full remedy is also contingent upon the discretion of the board of directors of the reorganized company.

I.

The probability of a public emergency precipitated by relaxation of the constitutional guaranty of due process.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the Court, or without notice to the party." *Scott* v. *McNeal*, 154 U. S. 34.

Brought on, however, we believe, by our imperfect presentation of the case in oral argument, we feel that this Court has erred in holding that the due process and contract

clauses of the Federal Constitution were not violated by what was done in the reorganization of the Pacific Mutual Life Insurance Company of California. The effect of the decision is that a state may forfeit title, without notice or hearing, to the assets of an insurance company, and thereafter deal with those assets upon the whim or fancy of its insurance commissioner.

Sixty-five million policy holders, owning 125,000,000 policies in life insurance companies in the United States, can no longer look to the Federal Constitution for protection of their life savings, invested in $110,000,000,000 in life insurance contracts, said to be secured by $25,000,000,000 in assets or reserves, built up mostly from the premiums they have paid to their insurers. They must now rely on the uncontrolled discretion of a short term political appointee of the state where the insurance company, with which they have contracted, was organized.

All the insurance commissioner needs to do now, in order to take title to the properties and assets of an insurance company, in which the reserves for the protection of the policyholders are invested, is a law of the state where the company was organized, giving him authority to file an application, reciting that he has found in secret that the company is deficient in some one of the cases enumerated in the statute, and the court, without notice or hearing, "must" give him title to all the assets and properties of the company in "fee simple" to deal with as he pleases.[1]

Even if the commissioner takes the case before a judge, whose orders are void for lack of jurisdiction in him to make them,[2] and through such void orders, completely reorganizes the company, the void orders of reorganization may be cured by subsequent order, again made without

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[1] Cal. I. C., §§ 4 & 1011; *Carpenter* v. *Pac. Mutual*, 10 Cal. (2) 307.

[2] Cal. Code of Civil Procedure, § 170; *Lindsay-Strathmore Irrigation District* v. *Superior Court*, 182 Cal. 315.

notice or hearing,[3] because such things are, in this decision, held to be matters of state law.[4]

Granting that the state legislature may vest an insurance commissioner with power to forfeit title to himself in the assets or reserves of an insurance company,[5] the legislature must, in conferring upon him that great power, require him, before he can make a constitutional exercise of it, to give notice to the policyholders and accord them a hearing in keeping with accepted judicial standards.[6] The Federal Constitution requires a state, whether acting through its courts or semi-judicial bodies of its creation, to provide for notice and hearing to all persons affected by their orders or due process under the 14th Amendment to the Federal Constitution will be denied.

Keeping in mind that the California Insurance Code makes no provision for notice or hearing to policyholders, stockholders, creditors, or others interested in an insurance company, as a prelude to a declaration of insolvency and forfeiture of title to the insurance commissioner, no notice was given or hearing had on August 11, when the void reorganization of Pacific Mutual was confirmed and the commissioner reappointed conservator and re-vested with title to the assets and properties of the old company. Heretofore, this Court has rigidly required that state legislation must provide for notice; it must be given; and the party to whom it is given must be accorded a hearing. Where any one of these three essentials has been missing, it has always been held that due process had been denied.[7]

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[3] 10 Cal. (2) 307.

[4] Opinion P. 3.

[5] Reserves of an insolvent insurance company are what is left of the assets after they fall below the level of legal reserve requirements.

[6] *Morgan* v. *U. S.*, 304 U. S. 1.

[7] *Windsor* v. *McVeigh*, 93 U. S. 274; *Coe* v. *Armour Fertilizer Co.*, 273 U. S. 413; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189.

If this decision stands, all life insurance companies in the United States may shift the burden of their mistakes of management to any unfavored group of policyholders by arbitrary reduction of the benefits of their policies to fit, in the discretion of the insurance commissioner, the size of the premiums fixed by the management in policy contracts. The serious public effects of the decision are aggravated by the comparative condition of the Pacific Mutual Life Insurance Company of California and that of all other life insurance companies in the country.

It is declared in the briefs of the respondents and was stated in oral argument by them that Pacific Mutual had \$223,000,000 in assets and \$600,000,000 in insurance, while all of the life insurance companies in the United States have \$25,000,000,000 in assets and \$110,000,000,000 in outstanding insurance. The ratio of the Pacific Mutual's reserves to outstanding insurance was 39 per cent and that of all the life insurance companies taken together is only 23 per cent.

With its ratio of reserves to outstanding insurance 70 per cent higher than that of the average company throughout the United States, no reason appears for the reorganization of the Pacific Mutual Life Insurance Company, unless it was done to perpetuate control of the assets of the old company in the small group that passed from the management of it to that of the new, or as a trial horse to establish a precedent for the liquidation of all insurance companies throughout the United States, which must speedily follow if the condition of the Pacific Mutual compared with the other companies means anything. If it was technically insolvent with its assets or reserves 70 per cent higher than the average, then all the other insurance companies in this country are hopelessly insolvent.

The actual condition of insurance companies in this country is worse than the picture painted by these figures. Every day we read in the news about the sad plight of the railroads. It is estimated from press reports that there

are $19,000,000,000 in railroad securities outstanding. It is no secret that the insurance companies have many if not most of them, which they carry at cost—a value several times greater than those securities now have. The earning statements of the railroad companies show no possibility of a recovery for their securities, but rather the probability of a continued decline. It may not be long now until every insurance company in the United States, using this decision as a criterion, will reorganize by shifting the burden of the mistakes of management in the purchase and retention of these railroad securities and in fixing premium rates to the 65,000,000 policy holders who have their life savings invested in insurance.

If there is no protection in the Federal Constitution for the Pacific Mutual policy holders, one group of whom saw the benefits of their policies reduced to 20 per cent of their face value, if they kept up the same premium rate, then there is nothing to keep every insurance company in the United States from taking advantage of the decision of this Court and scale down their outstanding policies to any arbitrary figure that may be selected. The petitioners and the other similarly situated policyholders in the Pacific Mutual expect that, following this decision, other companies in which they own policies will cut down the benefits to any arbitrary figure that may suit the fancy of the managements of the companies and the insurance commissioners of the states in which the companies were organized.

Insurance, which has always been thought to be the greatest security that a man could have against poverty in old age and as protection for his family after death has, by this decision, become one of the most uncertain of all investments, because the contracts of the policyholders are no longer protected by the Federal Constitution. Full control of the life savings of the great majority of the people in the United States has now passed to the states in which the insurance companies, they are insured in, were organ-

ized, freed of the protecting influence of the Federal Constitution.

Most of the states already have insurance laws somewhat similar to that of California. If not, it is possible that no more difficulty will be met in those states, which wish to adopt such a law, than was experienced in California, in putting the Insurance Code through the legislature of that state. Everything in the insolvency provisions of the California Insurance Code, as well as what has been done since its passage, indicates that the act was special legislation designed to give those in control of the Pacific Mutual the opportunity to shake out the policyholders who held contracts less favorable to the company and to fortify certain officers in control of the management of the $223,000,000 in assets, which carries with it great power and prestige to those to whom the state court has committed its care through the reorganization.

No emergency was declared in the statute or found by the state court to exist. Heretofore, not only might a contract not be changed, but the remedy could not be deferred unless a general emergency furnished an occasion for it.[8]

The small group, headed by Alexander Kemp, President, and Asa V. Call, Executive Vice President and General Counsel for the old company, became the dominant spirits in it just before its insolvency and, with the help of the insurance commissioner, cemented themselves in the same relative positions in the new company.

At the last session of the legislature, § 1037 of the California Insurance Code was amended so as to permit the insurance commissioner to transfer to a voting trust for twenty-one years the stock of the new company, all of which he had issued to himself in the reorganization. Shortly after that voting trust was set up and began working, Commissioner Carpenter resigned.

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[8] *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398.

Asa V. Call, General Counsel and Executive Vice President of the old and the new companies, who, with his wife, was a large stockholder in the company, sold their stock early in 1936, after he and Kemp had determined to reorganize the company under the new law. They were at that time working in conjunction with the Commissioner of Insurance to make the report which formed the basis of the insolvency proceedings.

After that, Kemp, as President, and Call, as Vice President, sent out a statement to the 300,000 policyholders of the company, which was then, so they said in that statement, put out only four months prior to the reorganization, "was emminently solvent."[9] These are the two men, who are now in control of and hold the same offices in the new company that they held in the old.

It was Kemp, as President of the old company, and Call and Harriman, as its attorneys, without any authorization of the board of directors, who appeared for the old company on July 22 and consented to the appointment of the Insurance Commissioner, first as conservator and then as liquidator.[1] Kemp, as President, and Harriman, as Secretary, joined with the Insurance Commissioner in the deed conveying all of the assets and properties of the old company to the new.[2]

These labors in bringing about the extinction of the old company being complete, the same officers appeared thereafter for the new company. Kemp, as President of the new company, on the same day signed and swore to the petition for an order directed to the policyholders of the old company to appear and show cause on August 12 why the plan and conveyance should not be approved.

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[9] Testimony before California Legislative Committee, Oct. 1937.

[1] R. 33, 48.

[2] R. 190; see *First Nat. Bank of Cincinnati* v. *Flershem*, 290 U. S. 504; *Shapiro* v. *Wilgus*, 287 U. S. 348; *Nat. Surety Co.* v. *Coriell*, 289 U. S. 426.

Asa V. Call showed up on this petition as attorney for the new company.[3] Call, at the same time as vice president of the new company, and Harriman as its secretary, joined with the Insurance Commissioner in executing the plan of rehabilitation.[4]

No resolution of the board of directors of either company was presented or filed with the court as authority for these acts of the officers of the old and of the new companies appearing in these inconsistent but self-interested positions. They could not kill the old corporation in that maner.[5]

The business of practically every company engaged in insurance is nationwide. With the curb of the due process and impairment of contract clauses of the Federal Constitution lifted, we will see all the confusion and inequities that will arise from the administration of insolvent insurance companies through the commissioners and the courts of forty-eight different states. Unless the rehearing is granted and the decision of the Supreme Court of California reversed, immediate and rigid Federal regulation is inevitable to meet the great emergency that may soon come.

Trust funds committed to corporations continue to be dealt with as if they belong to the managements. What happened in the reorganization of the Pacific Mutual proves that life insurance is no exception. That great company was declared to be insolvent, and public confidence in the reorganized company destroyed, because the premiums charged for non-cancellable accident and health policies were said to be inadequate to maintain the reserves required by law.[6] It is common knowledge that premiums charged by the Pacific Mutual and by companies generally on life and accident insurance are way too high in proportion to the benefits received.

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[3] R. 150, 151.

[4] R. 225

[5] *Coombes* v. *Getz*, 285 U. S. 434.

[6] R. 3.

The deficiency of $18,000,000 in reserves found by the Commissioner to have existed as of December 31, 1935, when he filed his application on July 22, 1936, could have been speedily remedied if the company had been allowed to continue business. The respondents admit that, in the seven months intervening between December 31, 1935, and July 22, 1936, the company's assets increased by $7,000,000, reducing the alleged deficit to $11,000,000. If the good will and value of agency force found by the court to be worth many millions of dollars had not been destroyed by the reorganization, it would have more than wiped out the comparatively small remaining deficit of $11,000,000.

Axioms in the insurance field are that the continued solvency of a life insurance company is dependent upon new business and that ability to get new business is ruined by a receivership or reorganization with the consequent detriment to the then policyholders.

It is evident that Pacific Mutual was never insolvent. If it had been let alone, it would have, in another eleven months, without taking into account the value of good will and agency force, judging by the increase in reserves of $7,000,000 in the seven months prior to the reorganization, completely wiped out the claimed deficit. But the record shows that the ambitions of the President and the Executive Vice President and General Counsel to get the exclusive control of the great business outweighed their responsibility to the policyholders.

II.

Due process is denied in a special proceeding brought by a state, unless the statute authorizing it requires notice. Notice given by direction of the court, when not required by the statute, does not give the court jurisdiction to act.

The void orders of July 22 and 23 have the additional infirmity of being made without notice or hearing. The order of August 11, upon which the whole proceedings hinge for their claimed validity was also made without notice or hearing, and is void for those reasons.

The state court evidently acted upon the theory that, since the Insurance Code required no notice, none was necessary. Section 1038 of the Insurance Code, requiring service of the application upon the company, was not observed. If it had been, it would have been immaterial, for such service is not required as a condition precedent to the order of conservation and of vesting title.

The court must act immediately upon the filing of the application. It must appoint the commissioner conservator and vest the title in him. If the personal service mentioned in § 1038 is not made, the court, under the mandatory provisions of §§ 1011 & 4, must, upon the filing of the application, give judgment. Even if personal service had been made on the company, it would have been ineffectual because §§ 1011 & 4 of the Insurance Code do not permit a hearing. When a court proceeds to judgment under a statute which provides for service but does not accord a hearing, due process is denied and the statute is unconstitutional.[1]

The state court held that everything done by the court on July 22 and 23 was void. However, it said that what was done then amounted to a seizure by the Insurance Commissioner of the properties and assets of the company

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[1] *Windsor* v. *McVeigh*, 93 U. S. 274, 278; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189.

under § 1013 of the Insurance Code. Section 1015 of the Code requires the commissioner, after summary seizure, to proceed immediately in the courts under §1011. This the Supreme Court of the State held that the Commissioner did. But all he did thereafter was done under the Code, which was unconstitutional because it required no notice and none was given.

If we assume that the seizure by the Commissioner and the proceedings begun when he filed his application gave the court jurisdiction of the properties and assets of the company, no jurisdiction was conferred on the court to go any further without notice and a hearing. The Insurance Code, §§ 1011 & 4, instead of requiring notice and hearing as a condition to appointing the commissioner as conservator and vesting title in him, makes it mandatory upon the court to issue the orders "upon filing the application."[2]

There came out of the abortive proceedings of July 22 and 23 a notice and order to show cause directed to all policyholders, stockholders, creditors and others interested, requiring them to appear on August 12 at 10 o'clock a. m., and show cause why the plan, transfer of assets and reorganization already completed should not be approved. This

[2] "The jurisdiction acquired by the court by seizure of the res was not to condemn the property without further proceedings. * * * A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit in rem only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges.

Windsor v. *McVeigh*, 93 U. S. 274, 279.

notice was not required by the statute, so the court had no jurisdiction to give it. Where a notice is not required by a special statute, though given, the Constitutional requirement of due process is not accorded.[3]

On August 11, the Commissioner, having become apprised of the void character of the reorganization he had procured from the court, he again without notice to anyone presented his application to the court.[4] No better evidence of our contention that the proceedings were collusive from the beginning could be had than that of the Commissioner appearing in court a day ahead of the time he had noticed a hearing and then having his acts approved, without giving anyone interested an opportunity to object. That action was not only a denial of due process; it was positively unfair within the meaning of *Morgan* v. *U. S.*, 304 U. S. 1. It was not incumbent upon a policyholder to move the court to set aside the order of August 11. "That would be a matter of discretion—a contingency he was not bound to contemplate."[4a]

The order of August 11, approving what had already been done and reappointing the commissioner as conservator and vesting title in him to all the assets of the old company in "fee simple", denied due process because it was made without notice. None was required by the statute and none was

[3] "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. * * * It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute. * * * This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, Sup. Ct. Rep. 410, the court declared. 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' "

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 425.

[4] This time a qualified judge, Honorable Henry M. Willis.

[4a] *Roller* v. *Holly*, 176 U. S. 398, 409.

given. The order shows that the Commissioner, through his counsel, presented and obtained the order *ex parte* transferring the title of the assets of the company to the Commissioner, not in trust as required by § 1057 of the Insurance Code, but in "fee simple". The state court holds that § 1037 (d) gives the commissioner, as conservator, broad powers[5] to deal with the assets in any way, subject, however, in certain instances, to the approval of the court, which it says he obtained. However, the opening provision of the section shows its unconstitutionality. It says that the "commissioner as conservator or liquidator * * * shall have authority *without notice*" to do the things therein specified with court approval. The statute itself declares its unconstitutionality because it expressly gives the commissioner the right to obtain court orders without notice.

The California court holds that this is a special proceedings. The consent of the company filed on July 22 is unimportant. If the statute does not accord due process, the lack of jurisdiction following cannot be conferred by consent.[6] A special statute must be strictly followed. Any proceedings outside of it are absolutely void.[7a]

We respectfully urge that these questions of due process were expressly raised both in the reasons in the petition and in the assignments of errors in the brief. (See Opinion this Court, page 4.)

If the order of August 11 reappointing the Commissioner conservator and vesting title in him was void for lack of due process, and it seems certain that it was, then all subsequent proceedings are absolutely void, including the final order of December 4. A valid order appointing Carpenter

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[5] R. 1534.

[6] *Lindsay-Strathmore Irrigation Dist.* v. *Sup. Ct.*, 182 Cal. 315; *Mitchell* v. *Maurer*, 293 U. S. 237; *Marin M. W. Dist.* v. *North Coast Water Co.*, 178 Cal. 324, 328.

[7a] *East Tenn. V. & G. Ry.* v. *So. Tel. Co.*, 112 U. S. 306, 310; *Smith* v. *Westerfield*, 88 Cal. 374, 378; *Murray* v. *Am. Surety Co.* (C. C. A. 9), 70 Fed. 341, 346.

conservator was a condition precedent to his proceeding under § 1043 to rehabilitate the company. That section, however, was unconstitutional because nowhere does the Code provide for notice preceding the approval by the court of rehabilitation agreements entered into by the Commissioner. The only notice given was by order of the court. "The order prescribed in detail the nature of the notice of the hearing required to be given. Pursuant thereto, notice in a form prescribed by the court" was posted, published in the newspapers and mailed to the policy holders and stockholders of the old company.[7] We have seen that this Court has held that, where a statute prescribes no notice, the law is unconstitutional and the court is without jurisdiction to order given, the notice omitted by the statute. This makes the final order of December 4th void for lack of due process.

The order of August 11, appointing the Commissioner conservator was collusive within the meaning of the decisions of this Court.[8] Section 1028 of the Insurance Code prevents the introduction of a collusive order in evidence. The order of August 11 was the only evidence of Carpenter's right to proceed after that time.

III.

The alternative remedy given non-assenters must be definite and absolute. It cannot be left to discretion.

A valid judgment appointing Carpenter conservator was necessary before the court could proceed to render the judgment of December 4, approving the rehabilitation agreement. The Commissioner could not proceed under § 1043 unless he was conservator. The cases cited show that due process was denied and the contracts of the policyholders impaired as contended in the petition and briefs on the writ of certiorari. The non-assenting policyholders

[7] R. 1524—Opinion of Cal. Supreme Ct.

[8] *First Nat. Bank* v. *Flershem*, 290 U. S. 504; *Shapiro* v. *Wilgus*, 287 U. S. 348; *National Surety Co.* v. *Coriell*, 289 U. S. 426.

were denied due process of law and their contracts impaired,[9] as no substantial right to redress by some effective method of procedure was provided by the mere contemplation in the plan (Opinion, this Court, p. 5) that, in due course, the commissioner would be appointed liquidator of the old company, and the recital of the Superior Court in its final order that, in the absence of evidence being brought up, the dissenting policyholders would receive more from the plan than they would receive in liquidation.

These are erroneous constructions of the constitutional rights of the non-assenting policyholders. No one, under the Code, except the Commissioner has the right to apply to the court to be appointed liquidator. He does not have to apply, but he may apply, if it appears to him that further efforts on his part as conservator would be futile.[1]

When the commissioner sees the futility of his acts as conservator, he then, in his discretion, may file his application with the court, and the court, after a "full hearing", has to exercise its discretion to determine whether or not the commissioner shall then be appointed liquidator. No effective procedure is thus provided within the meaning of *Gibbes* v. *Zimmerman,* 290 U. S. 326.

Although the petitioners have no constitutional right to any particular form of remedy, as this Court holds, they have an inviolate right to redress by some effective procedure. The Constitution guarantees to the non-assenting policyholder the right to file and enforce his claim by a procedure which is not dependent upon the discretion of any one, much less upon a commissioner's discretion, first determining that he has been a failure as a conservator and then dependent upon the discretion of the court after hearing.[2]

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[9] *Lovell* v. *St. Louis Mut. Life Ins. Co.,* 111 U. S. 264, 273; *Nor. Pacific Ry.* v. *Minn.,* 208 U. S. 583, 591.

[1] Cal I. C. § 1016.

[2] *Louisville and N. R. Co.* v. *Central Stockyards Co.,* 212 U. S. 132, 144; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115.

The non-cancellable income policyholders have to depend upon yet another contingency of discretion, this time that of the board of directors of the new company. The rehabilitation contract provides that they are to receive only a percentage of their claims in liquidation until at such times as certain profits are earned by the new company and, in the discretion of the board of directors, they are to be paid to the liquidator when and if he ever exercises his discretion to move the court for an appointment and the court, in its discretion, appoints him. No claim may be filed except with the liquidator.[3]

Nothing can be left to discretion. While the record may be incomplete because the evidence was not brought up, it, however, plainly appears from the judgment roll, the Insurance Code and particularly the plan that a policyholder who does not want to assent to the plan, must assent or await the discretion of the commissioner to apply to be appointed and for the court to appoint him. The non-cancellable policyholders must await the further discretion of the board of directors to pay their claims in full from profits, which may or may not ever be earned.[4]

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[3] Cal. I. C. §§ 1021-1027.

[4] R. 1520—from opinion of California Supreme Court: any life policyholder not assenting to the plan was to file a claim with the commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but disability payments on such policies were to be assumed on a basis of from 20 per cent to 90 per cent of the face of such policies depending upon the year of issue. Certain provisions were incorporated in the proposed agreement for future increased benefits to be paid to consenting non-can policyholders from certain profits of the new company. Nonconsenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all [fol. 1516] allowed claims to be assumed by the new company as provided in the agreement.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."[5]

"The law itself must save the party's rights and not leave them to the discretion of the courts as such."[6]

For the sake of the Constitution and the protection of the 125,000,000 contracts of 65,000,000 policyholders, a rehearing should be granted so that the application of the Federal Constitution to a case of this kind may not be dependent upon the discretions *ad seriatim* of a state insurance commissioner, a state court, and a board of directors of a reorganized insurance company. We respectfully claim that the decision, in effect, relinquishes to the discretion of those three tribunals the right to determine the application to insurance contracts of Article I, Section 10, and the due process clause of the 14th amendment of the Federal Constitution.

This court (Opinion pages 5 and 6) indicates that, if the evidence was before it, possibly the decision herein might have been different. The recitals in the final order of the Superior Court, reproduced on Page 5 of the Opinion, do not touch upon the questions of due process and the impairment of the obligation of contract. They refer to the practicability or feasibility of the plan, amounting to a mere assertion that the plan does not violate the Constitution. The plan itself shows that it does, so this is an assertion contradictory of the judgment roll and of the Insurance Code. Constitutional guaranties cannot be set aside by assertion.[7] In such circumstances where the proceed-

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[5] *Roller* v. *Holly*, 176 U. S. 398; *Louisville and Nashville Ry. Co.* v. *Central Stockyards*, 212 U. S. 132, 144; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189, 193.

[6] *Louisville & N. Ry.* v. *Central Stockyards Co.*, 212 U. S. 132, 144.

[7] *Morgan* v. *U. S.*, 304 U. S. 1.

ings are begun without due process, evidence adds nothing to them.[8]

The application filed August 14 for the appointment of the Commissioner as liquidator was never acted upon because it was abandoned.[9] It cannot be acted on now because it has been merged in the final judgment.

The court might readily consider as a part of the justice of the petitioners' cause the practical difficulties which beset them in their efforts to protect the policyholders against what we believe the record shows to be a collusive proceeding. As a part of this collusion and in order to beat down opposition to the plan, arranged between a small group of corporate officers and the Insurance Commissioner, it usually is and seems to have been the strategy here to build up a record so large that the expense of bringing up the evidence on appeal is a practical impossibility. The Commissioner and that small group of officers of the old and new companies have at their disposal the whole of the $223,000,000 of the policyholders' reserves with which to fight the dissenters in the court. A glance at the judgment roll indicates that to have the evidence reported and printed, with all the data and statistics that ordinarily is introduced at such a hearing, would cost those who appealed, by conservative estimate, not less than $50,000.

The policyholders are unorganized and cannot be welded into a group. No one but the Commissioner and the officers in control know who they are because the Commissioner and the company guard with the greatest secrecy the list of

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[8] "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 424.

[9] Referred to top of page 5 in Opinion of this Court. See Opinion of *Cal. Supreme Ct.*, R. 1522. At R. 1526 Cal. Supreme Ct. held that all of judgment roll was one record merged into final judgment of Dec. 4.

policyholders. An application to be given a list was denied by the Superior Court in this case. In the helpless condition in which the policyholders who dissent from such a plan find themselves in appealing to the upper courts in this day of the consolidation of their reserves in a few hands, it may in time, if we have not already reached that day, become a denial of due process, to require a policyholder to bring in a record which is entirely beyond his means in order to obtain a full hearing before an appellate court.

For these reasons, we respectfully urge that this motion for rehearing be granted and that the judgment of the Supreme Court of California be reversed and that the issuance of the mandate of this Court be stayed, pending the disposition of this motion and of the rehearing.

Respectfully submitted,

Wm. H. Neblett,
R. Dean Warner,
Vernon Bettin,
By Wm. H. Neblett,
Attorneys for Petitioners.

Alfred F. MacDonald,
Allan McCurdy,
Of Counsel.

Washington, D. C.
December 23, 1938.

CERTIFICATE.

I, Wm. H. Neblett, one of the counsel for the petitioners herein, do hereby certify that in my opinion the foregoing petition for rehearing and for stay of mandate pending its determination and decision is sound in law and that the same is presented in good faith and not for the purposes of delay.

Wm. H. Neblett.

APPENDIX.

CALIFORNIA INSURANCE CODE

1028. A judgment taken by default, or by collusion, against an insured shall not be considered as evidence, in the liquidation proceeding, either of the liability of such insured to such claimant upon such cause of action or of the amount of damages to which such claimant is entitled.

1037. Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

1037 (e). The commissioner as conservator or as liquidator * * * shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to him as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. Such voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent such stock, and shall not be irrevocable for a period of more than twenty-one (21) years.

1038. Any application upon section 1011 or 1016 shall be served upon the person named in such application in the manner prescribed by law for personal service of summons or as provided by section 1039.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1938.

Wm. H. Neblett, Vernon Bettin, William George Dickinson and Alfred E. MacDonald, Petitioners, *vs.* Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, et al.	On Writ of Certiorari to the Supreme Court of the State of California.

[December 5, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The questions raised are whether proceedings for the rehabilitation of an insurance company, pursuant to the Insurance Code of California,[1] unconstitutionally deprive policy holders of their property without due process of law, or impair the obligation of their contracts.[2]

For many years the Pacific Mutual Life Insurance Company of California has written life, health, and accident insurance. Since 1918 it has issued noncancelable health and accident policies. The Insurance Commissioner of California determined that, while the life and general health and accident business was in sound condition, there was an over-all deficit in reserves due to the unprofitable nature of outstanding noncancelable health and accident risks, with the result that the company was insolvent within the meaning of the Code. July 22, 1936, the Superior Court of Los Angeles County, on his application, appointed him conservator. On the same day he applied for and obtained an order which appointed him liquidator of the company. On the same day, as conservator, he peti-

[1] Statutes 1935, Chap. 145, pp. 540-553. The sections of the Insurance Code bearing upon the issues in the case are 1011-16, inclusive, 1021, 1024, 1025, 1035, 1037, 1043.

[2] In the court below contentions were made under the equal protection clause of the Fourteenth Amendment but neither the reasons stated in support of the petition nor the assignments of error in this court present any question under that clause.

tioned for authority to rehabilitate the company and submitted a plan embodying an agreement, to be executed by the company and himself as Commissioner, with a new corporation, which he would form, all of whose capital stock he would purchase with the assets of the company, and to which he would transfer most of the assets, retaining the stock of the new company and certain other assets of the old. The new company was to assume the policies and obligations of the old company to the extent provided in the agreement. Policy holders were to have the option of taking insurance from the new company or proving their claims for breach of their contracts, provision for payment being made by covenants of the new company and the retained assets of the old. The court approved the plan and authorized the execution and performance of the agreement.

Shortly afterwards it was discovered that the judge who acted in the cause was probably disqualified by ownership of a policy issued by the company. August 11, 1936, another judge entered an order, which, after adverting to the possible disqualification of the judge who made the earlier orders, ratified, approved, and confirmed the order appointing the Commissioner conservator and, on the basis of the petition filed on July 22, independently, and as an original order, appointed the Commissioner conservator, invested him with title to all the company's assets, and authorized him to endeavor to consummate a rehabilitation or reinsurance plan. On September 25 the Commissioner presented a further petition for approval of the rehabilitation and reinsurance agreement, which recited his actions taken pursuant to the court's orders and to the plan of rehabilitation, and asked approval thereof. An order issued which directed all interested persons to show cause why the agreement, and what had been done pursuant to it, should not be approved and all the prior acts of the Commissioner ratified and confirmed, and fixed a hearing. At the hearing, which lasted from November 19 to December 4, many officers, stockholders and policy holders who had intervened, including the petitioners, were heard. Plans of rehabilitation presented by some of them were considered; evidence was taken and argument was had. December 4 an order was entered approving the Commissioner's plan and agreement, ratifying the action he had taken, and authorizing him as conservator, and as liquidator, if he should be appointed as such, to carry out the rehabilitation agreement. The

court retained jurisdiction to make further orders for the effectuation of the plan and agreement.

The Supreme Court of California affirmed the order.[3] The action of that court in overruling certain of petitioners' contentions is claimed to have deprived them of their property without due process.

The Court declared that the orders of July 22, 1936, were void because of the disqualification of the judge who made them. The petitioners argue that in consequence the Commissioner's transfer of assets to a new company pursuant to the approved plan was void and that its illegality could not be cured by subsequent court action. The Supreme Court held, however, that the court in which the Commissioner's original petition was filed thereby acquired jurisdiction and that the avoidance of the orders made by the disqualification of the judge who entered them did not disenable a qualified judge thereafter from entering valid orders based on the petition. It is further urged that as the old company's assets were transferred to the new pursuant to a void order there was nothing on which any later order could operate. The later order, which is the subject of review, ratified and confirmed the transfer, and the Supreme Court held the order effective under the Insurance Code.

It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.

It is argued that the authority which the Code confers on the Commissioner to enter into rehabilitation or reinsurance agreements does not embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplated such action.

It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The state court held the contrary.

All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amend-

[3] Carpenter v. Pacific Mutual L. I. Co., 10 Cal. (2d) 307.

ment.[4] We are, therefore, without jurisdiction to review the state court's decision of any of those questions.

It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us.[5]

The Insurance Code provides: "In any proceeding under this article, the commissioner, as conservator . . . may, subject to the approval of said court, . . . mutualize or reinsure the business of" an insurance company "or enter into rehabilitation agreements." The petitioners assert that this language is so vague that no one can determine what powers are intended to be conferred upon the Commissioner and that the state courts, in construing the Code to authorize the plan and procedure here in question unconstitutionally attempted to read a meaning into the statute of which it is not susceptible, and thus deprived the petitioners of their property without due process. The court below fully considered the contention and overruled it. We think its decision was justified by the criteria approved by this court.[6]

The petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation adopted by the Commissioner and approved by the court, even if authorized by the Insurance Code, denies them due process and impairs the obligation of their policy contracts. Because of these contentions we granted certiorari.

One of the petitioners holds a life policy which, if he assents to the plan, will be replaced by a policy of the new company for the same amount. The others are holders of noncancelable health and accident policies no liability under which has accrued. If they assent to the plan and accept the obligation of the new company, in lieu of that of the old, they will receive insurance for only a percentage of the face value of their old policies. The alternative open to all is to dissent from the plan and to prove their claims for breach of their policy contracts against the liquidator of the old company. They insist this option is not available to them as no

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[4] Arrowsmith *v.* Harmoning, 118 U. S. 194, 196; Central Land Co. *v.* Laidley, 159 U. S. 103, 112; Iowa Central Ry. Co. *v.* Iowa, 160 U. S. 389, 393; West *v.* Louisiana, 194 U. S. 258, 261; Standard Oil Co. *v.* Missouri, 224 U. S. 270, 287; McDonald *v.* Oregon R. & N. Co., 233 U. S. 665, 669; American Ry. Exp. Co. *v.* Kentucky, 273 U. S. 269, 273.

[5] Ohio *v.* Akron Park District, 281 U. S. 74, 79.

[6] Connally *v.* General Construction Co., 269 U. S. 385, 391.

liquidator has been appointed. When they took their appeal to the State Supreme Court, there was pending an application for the appointment of the Commissioner as liquidator, and no reason is assigned why action cannot be taken upon this petition pursuant to the plan. The Supreme Court has said: "The proposal contemplates that in due course the commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement." The petitioners assert that the funds provided will be insufficient for the payment of their claims and others of like character, should they dissent from the plan. The order of the Superior Court recites that the plan makes adequate provision for each class of policy holders, for the creditors, and for the stockholders; that the plan is fair and equitable; that it does not discriminate unfairly or illegally in favor of any class of policy holders; that the intangible assets conserved by the plan are worth several million dollars and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan.

The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the state law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their contention that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds.

The petitioners have no constitutional right to a particular form of remedy.[7] They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force, at their own wish or whim, a liquidation which under the findings will not advantage them and may seriously injure those who accept the benefit of the plan. They are not bound, as were the dis-

[7] Gibbes v. Zimmerman, 290 U. S. 326, 332; Doty v. Love, 295 U. S. 64, 70.

senting creditors in *Doty* v. *Love*, 295 U. S. 64, to accept the obli-
gation of the new company but are afforded an alternative whereby
they will receive damages for breach of their contracts. They have
failed to show that the plan takes their property without due
process.

It is not contended that a statutory scheme for the liquidation of
an insolvent domestic corporation is *per se* an impairment of the
obligation of the company's contracts. The argument is that the
impairment of contract arises from the less favorable terms and
conditions of the new noncancelable policies which are to be sub-
stituted for the old ones and, in the case of the life policies, by the
substitution of a new company as contractor in place of the old
without the consent of the policy holder. This position is bot-
tomed upon the theory that the policy holders are compelled to
accept the new company as insurer on the terms set out in the re-
habilitation agreement. As has been pointed out, they are not so
compelled but are given the option of a liquidation which on the
record appears as favorable to them as that which would result
from the sale of the assets and pro rata distribution in solution of
all resulting claims for breach of outstanding policies.

Judgment affirmed.

Mr. Justice Reed took no part in the consideration or decision of
this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.